

March 8, 2006

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands* – WT Docket No. 03-66 –
WRITTEN EX PARTE PRESENTATION

Dear Ms. Dortch:

As the Commission proceeds towards resolution of the petitions for reconsideration of the *Report and Order* in the above-referenced proceeding, it is being asked by some Educational Broadband Service (“EBS”) interests to limit the maximum term of EBS excess capacity leases to just 15 years.¹ I am writing on behalf of the Wireless Communications Association

¹ It is worth reiterating that many EBS licensees have urged the Commission to refrain from imposing any limit on the duration of EBS leases, recognizing that a maximum lease term threatens the substantial economic and operational support that EBS receives from commercial operators. *See, e.g.*, Letter from Father Jim Vlaum, President & CEO, Diocesan Television Operations, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Dec. 6, 2005); Letter from Gerald Gill, Director, Diocese of Lafayette, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Dec. 21, 2005); Letter from Kemp Harshman, President, Clarendon Foundation, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Dec. 5, 2005); Letter from James W. Trietsch, Associate Chief Information Officer, Abilene Christian University, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Dec. 20, 2005); Letter from Alisa Jones, Supervisor of Instructional Support Services, School District of Clay County, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Jan. 5, 2006); Letter from Rayford Fontenont, Superintendent, Evangeline Parish Schools, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Dec. 20, 2005); Letter from Wesley Wells, Superintendent, Morrisonville C.U.S.D. #1, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Dec. 29, 2005); Letter from Travis Roundcount, Superintendent, Patoka Community School District No. 100, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Dec. 12, 2005); Letter from Heritage Baptist Church & Christian Academy, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Jan. 3, 2006); Letter from Rudolph Geist, Counsel to the Hispanic Information and Telecommunications Network, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Jan. 27, 2006); Letter from David Kumm, VP for Finance, Operations & Planning/CFO, Concordia University, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Dec. 22, 2005); Letter from Richard Joyer, Assistant Superintendent, Pearsall Independent School District, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Jan. 10, 2006); Letter from Father Edward Anthony, Franciscan Canticle, Inc. to Marlene

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International, Inc. (“WCA”) to address the argument that such a restriction would be benign for commercial broadband service providers because “the Commission allows lessees to obtain a right of first refusal as a provision within EBS leases, which means that under current policies the lessee can be assured of continued access to spectrum for 30 years.”² WCA disagrees: a 15 year lease containing a right of first refusal does not provide an assurance of continued access to spectrum for 30 years.

The simple, undisputable fact is that a right of first refusal at the end of a 15 year lease does not provide any assurance of continued access to spectrum for 30 years. By definition, a right of first refusal is not a “right” at all, since it merely entitles the holder to match an offer from a third party should the grantor of the option be minded to accept that offer.³ In other words, unless the EBS licensee elects to enter into a new lease after the initial 15 year lease term expires, the commercial operator would have no right whatsoever to access the spectrum for a second 15 years. That hardly inspires investor confidence that the spectrum will be available beyond 15 years.

Moreover, even when licensees elect to lease for a subsequent term, rights of first refusal running in favor of the incumbent hardly assure continued access to spectrum. The problem, in a nutshell, is that a licensee and newcomer lessee can craft a new lease in a myriad of ways that frustrate the incumbent’s right of first refusal. For example, the new lease could allow commercial use to the spectrum to commence only 6 months after the termination of the initial lease. While that may be acceptable to the new operator (who requires time to construct and test its new network anyway), it would prove devastating to the incumbent operator (who requires uninterrupted access to the spectrum to continue service to its existing subscriber base). Or, the new lease could specify the technology that must be deployed by the commercial operator, which would effectively undercut the incumbent operator if the incumbent has deployed a different technology. Whether these provisions are added intentionally to undermine the right of first refusal, or merely have that effect, is of no moment – the important point is that they effectively preclude the incumbent from enjoying continued access to the spectrum.

H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Jan. 6, 2006); Letter from Bob Schmoll, Executive VP and CFO, Dana College, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Dec. 30, 2005).

² Letter from John B. Schwartz, Director, The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66, at 2 (filed Jan. 9, 2006).

³ See *Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures*, Eighth Report and Order, 17 FCC Rcd 2962, 2965 (2002); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 454-55 (1994). See also *Miller v. Lesea Broadcasting*, 87 F.3d 224, 226 (7th Cir. 1996); *Uno Rests., Inc. v. Boston Kenmore Realty Corp.*, 441 Mass. 376, 388-89 (Mass. 2004).

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Certainly, rights of first refusal have value, and the Commission should not restrict the flexibility of licensees and lessees to negotiate rights of first refusal following the expiration of spectrum leases. However, the Commission should not be fooled into thinking that a 15 year maximum lease term, coupled with a right of first refusal, provides investors the confidence they need that the commercial operator will have sufficient uninterrupted access to EBS spectrum. There are simply too many uncertainties associated with rights of first refusal.

Pursuant to Section 1.1206(b)(1), this notice is being filed electronically with the Commission via the Electronic Comment Filing System for inclusion in the public record of the above-reference proceeding. Should you have any questions regarding this presentation, please contact the undersigned.

Respectfully submitted,

/s/ Paul J. Sinderbrand
Paul J. Sinderbrand

Counsel to the Wireless Communications
Association International, Inc.

cc: Fred Campbell
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